Supreme Court, U.S.
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NO. 02-980

IN THE

Supreme Court of the United States

CORE COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

BACKGROUND 2

ARGUMENT 3

I. The Decision to Remand Without Vacatur Conflicts With Relevant Decisions of This Court 3

II. Whether the United States Court of Appeals for the D.C. Circuit May Remand an Agency Decision Without Vacating It Is an Important and Unsettled Question of Federal Law. ... 5

III. Remand Without Vacatur Denies the Successful Litigant an Adequate Remedy 7

IV. Remand Without Vacatur Constitutes an Evasion of the Requirements of *Bowen v. Georgetown University Hospital*. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission, 988 F.2d 146 (D.C. Cir. 1993) 5, 9

American Bioscience, Inc. v. Thompson, 269 F.3d 1077 (D.C. Cir. 2001) 8

American Medical Ass'n v. Reno, 57 F.3d 1129 (D.C. Cir. 1995). 5

Andrx Pharmaceuticals, Inc. v. Biovail Corporation, 276 F.3d 1368 (Fed. Cir. 2002) 8

Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir 2000) 2

Camp v. Pitts, 411 U.S. 138, 143, 93 S.Ct. 1241 (1973) 4

Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994) 5, 6, 7

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) 4

ICORE, Inc. v. FCC, 985 F.2d 1075 (D.C. Cir. 1993) 9

Milk Train, Inc. v. Veneman, 310 F.3d 747 (D.C. Cir. 2002) 6

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, (1978)..... 4

WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2000) 1, 3, 7

STATUTES

47 U.S.C. § 201 3

47 U.S.C. § 251(b)(5)..... 2, 3, 4

47 U.S.C. § 251(g) 3, 7

ADMINISTRATIVE DECISIONS

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling, 14 FCC Rcd 3689 (1999) 2

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ..... passim

OTHER AUTHORITIES

Levin, Ronald M., "Vacation at Sea: Judicial Remands and the APA," 21-SPG Admin. & Reg. L. News 4 (1996) 4

Prestes, Brian S., "Remanding Without Vacating Agency Action," 32 Seton Hall L. Rev. 108 (2001) 4

Wu, Frank H., and Williams, Denisha S., "Remand Without Reversal: An Unfortunate Habit," 30 Envtl. L. Rep. 10193 (2000) 6

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Respondents Focal Communications Corporation, Pac-West Telecomm, Inc., RCN Telecom Services, Inc., Starpower Communications, LLC, and US LEC Corp. (collectively, "Competitive Local Telephone Companies"), each of whom were Appellant-Intervenors in the proceeding below, hereby submit their Response in Support of the Petition for Writ of Certiorari filed by Core Communications, Inc. ("CoreTel") on December 23, 2002. CoreTel petitioned for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2000). The Court should grant the writ requested by CoreTel because the *WorldCom* decision conflicts with relevant decisions of this Court. In addition, CoreTel raises an important question of federal law that has not been, but should be, settled by this Court.

Although the case at the D.C. Circuit arose under the Communications Act of 1934, as amended by the

Telecommunications Act of 1996 (the "Telecom Act"), the question presented for review is not related to the Telecom Act. Instead, the question presented is one related solely to administrative law, and more specifically, to federal court supervision of federal agencies. At bottom, this case deals with a federal court's choice of remedy on the review of a decision of a federal agency. Specifically, at issue here is the decision of the D.C. Circuit, upon reviewing a decision of the Federal Communications Commission ("FCC"), and after rejecting the statutory foundation on which the decision was based, to remand the decision to the agency without also vacating or reversing it. The Court should grant the writ of certiorari in order to review this decision and vacate the decision under review. The Competitive Local Telephone Companies submit this Response in Support to supplement the arguments asserted by CoreTel for granting the writ of certiorari.

BACKGROUND

As CoreTel explained in its Petition, in February 1999 the FCC released a *Declaratory Ruling* in which it stated that section 251(b)(5) of the Telecom Act, 47 U.S.C. § 251(b)(5), did not require the payment of "reciprocal compensation" for calls to the local telephone number of an Internet service provider ("ISP"). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*"). In March 2000, the D.C. Circuit vacated and remanded the *Declaratory Ruling* for lack of reasoned decision-making. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir 2000). On remand in April 2001, the FCC issued an Order in response to the D.C. Circuit's *Bell Atlantic* decision, and also implemented a new, interim, prospective compensation mechanism for carriers that exchanged telephone calls to ISPs. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"). Several carriers appealed the FCC decision and the new, interim compensation mechanism.

In the *ISP Remand Order*, the FCC asserted that section 251(g) of the Telecom Act, 47 U.S.C. § 251(g), provided it with the authority to exclude ISP-bound traffic from the requirements of section 251(b)(5). The FCC then established an interim, intercarrier compensation mechanism under its general regulatory authority under section 201, 47 U.S.C. § 201. In May 2002, the D.C. Circuit rejected the view that section 251(g) provided the FCC with the authority it claimed to have. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). While rejecting the statutory basis for the *ISP Remand Order*, however, the D.C. Circuit did not vacate that *Order*, or the interim intercarrier compensation mechanism, which the Competitive Local Telephone Companies also had challenged. The panel observed that the FCC may be able to find some other statutory authority that would allow it to avoid application of section 251(b)(5) to ISP-bound traffic and implement its new compensation regime, which the FCC had not yet identified (and seven months later, still has not identified.)[1] Thus, the Competitive Local Telephone Companies and CoreTel were the prevailing parties on appeal, yet they were denied an adequate remedy when the D.C. Circuit elected not to undo the harms caused by the *ISP Remand Order*.

ARGUMENT

I. The Decision to Remand Without Vacatur Conflicts With Relevant Decisions of This Court

The Court should grant a writ of certiorari in this proceeding because the D.C. Circuit's decision to remand the *ISP Remand Order* to the FCC without also vacating it conflicts with relevant decisions of this Court. Review of this case is necessary to correct the error of the D.C. Circuit.

The Court's jurisprudence regarding the Administrative Procedure Act ("APA") is clear and unequivocal. "In *all* cases

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[1] Although not relevant to the issue presented in the CoreTel Petition, it is conceivable that the FCC does have authority to implement its interim compensation regime under its general regulatory authority. What it may not do, however, is impose a new regulatory regime based on statutory authority other than section 251(b)(5) without first explaining why the existing regulatory regime under section 251(b)(5) is not applicable to ISP-bound traffic.

agency action *must* be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971) (emphasis added). The Court has not wavered from that standard. When the D.C. Circuit found that the *ISP Remand Order* was "not in accordance with law," it was obligated to vacate the *Order*.

Further, a federal court may not impose additional procedural requirements than those established in the APA. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202 (1978). Giving the FCC a third opportunity to identify a new statutory basis to exclude ISP-bound traffic from carriers' 251(b)(5) obligations, while keeping the illegally implemented rules and regulations in place, constitutes a procedural "mulligan" not permitted under the APA.

Finally, an agency decision stands or falls on the administrative record on which the agency relied in making its decision. *Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 1244 (1973). If that decision is not sustainable on the administrative record, it must be vacated and remanded to the agency for further consideration. *Id.* The D.C. Circuit failed to adhere to this standard when it declined to vacate the *ISP Remand Order*, effectively permitting the FCC to generate a "post-hoc rationalization" that is prohibited by *Camp v. Pitts*. Because the D.C. Circuit found that the *ISP Remand Order* was not supportable on the legal grounds asserted by the FCC, the D.C. Circuit had no choice but to vacate and remand the decision to the FCC. The Court should grant CoreTel's Petition for Certiorari to correct the D.C. Circuit's error. *See* Prestes, Brian S., "Remanding Without Vacating Agency Action," 32 Seton Hall L. Rev. 108 (2001); Levin, Ronald M., "Vacation at Sea: Judicial Remands and the APA," 21-SPG Admin. & Reg. L. News 4 (1996).

II. Whether the United States Court of Appeals for the D.C. Circuit May Remand an Agency Decision Without Vacating It Is an Important and Unsettled Question of Federal Law.

Notwithstanding the clear instructions from this Court that agency action in violation of the APA must be set aside in all cases, the D.C. Circuit has fashioned an alternative remedy that preserves the unlawful agency action pending reconsideration by the agency. By remanding the *ISP Remand Order* without also vacating it, the D.C. Circuit has extended a practice of questionable legality that this Court should review.

In fact, the question is not even settled within the D.C. Circuit itself. Individual judges within the D.C. Circuit have recognized the questionable legality of the "remand without vacatur" practice. In 1993, the D.C. Circuit identified certain criteria to consider in determining whether a decision remanded to a federal agency should also be vacated. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993). The following year in *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994), two judges engaged in a vigorous debate whether the "shall set aside" language from section 702 of the APA meant that all agency actions remanded by a reviewing court required vacatur. The prevailing view was that a decision could be remanded but not vacated when the agency has not adequately explained its position in order for the court to determine the lawfulness of the agency action. *Id.* at 462 (Silberman, J., concurring). The minority view was that "[o]nce a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court—in the absence of any contrary statute—to vacate the agency's action." *Id.* 23 F.3d at 491 (Randolph, J. concurring). The D.C. Circuit subsequently stated that the issue raised in *Checkosky* had not yet been settled: "we do not reach the question raised and left undecided in *Checkosky* as to the validity of this precedent." *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1136 n.4 (D.C. Cir. 1995).

Even though the validity of remand without vacatur had not been decided, the D.C. Circuit has continued the practice. *See* Wu, Frank H., and Williams, Denisha S., "Remand Without

Reversal: An Unfortunate Habit," 30 Envtl. L. Rep. 10193 (2000). Nevertheless, at least one judge of the D.C. Circuit continues to believe that "remand without vacatur" violates the APA. In a recent dissenting opinion, Judge Sentelle endorsed the view of Judge Randolph in the *Checkosky* decision, and added to his argument: "*Heckler v. Chaney,* 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), among many other cases, establishes the proposition that courts are not to substitute their administrative judgments for those of the agency. . . . Therefore, when we hold that the conclusion [of the agency] heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting).

The crux of Judge Silberman's argument in *Checkosky* was that the APA is not necessarily violated when a reviewing court finds that an agency has not provided sufficient explanation for one of its actions. Judge Silberman contended that the court was unable to determine whether the agency had violated the APA because the agency had not explained itself adequately in order for the court to determine the basis for the agency action. *Checkosky*, 23 F.3d 452, 462 (D.C. Cir. 1994) (Silberman, J., concurring). Judge Silberman did not assert, however, that a reviewing court could find a violation of the APA and also remand an agency decision without also vacating it. Indeed, Judge Silberman recognized a distinction in those cases that warranted remand without vacatur from those that must be vacated: "In practice, the distinction—between a case where the reviewing court determines that the agency's explanation for its action is so crippled as to be unlawful and one where the court, unsure of the agency's reasoning, remands for a fuller explanation without expressing a view as to whether the agency's action is unlawful—is a matter of degree. But doctrinally the difference is enormous[.]" *Id.* at 464.

Yet the D.C. Circuit appeared to have no difficulty bridging this enormous doctrinal difference in *WorldCom* when the D.C. Circuit remanded the *ISP Remand Order* without also vacating it, even though the court determined that the FCC had erred as a matter of law by misreading the Telecom Act: "We agree with

petitioners that § 251(g) is not susceptible to the Commission's reading." *WorldCom* at 432. Further, "nothing in § 251(g) seems to invite the Commission's reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations." *Id.* at 433. Moreover, "§ 251(g) does not provide a basis for the Commission's action[.]" *Id.* at 434. Whatever the merits may be of remanding without vacatur under the circumstances of *Checkosky*, this case requires vacatur because the agency clearly erred as a matter of law.

III. Remand Without Vacatur Denies the Successful Litigant an Adequate Remedy

The Competitive Local Telephone Companies, in addition to numerous other competitors to the Regional Bell Operating Companies ("RBOC")and other incumbent local telephone companies, appealed the *ISP Remand Order* because the FCC grossly misinterpreted the provisions of the Telecom Act applicable to the dispute. These petitioners prevailed when the D.C. Circuit agreed that the FCC had erred. Nevertheless, the D.C. Circuit's decision to remand without vacating the *ISP Remand Order* effectively denies these successful appellants an adequate remedy.

The *ISP Remand Order* imposed a draconian and unnecessary "interim" compensation regime on the competitive industry. It is draconian because it literally closed off markets that were previously available to competitors, and capped the ability of competitive carriers to recover costs from the carriers that cause those costs. It is unnecessary because the justification that underlies it (calls to ISPs are not within carriers' section 251(b)(5) obligations) has been rejected. Although the FCC felt that the new interim compensation regime was necessary to prevent widespread "regulatory arbitrage" that it claimed existed prior to the *ISP Remand Order*, SBC Communications, Inc., the second-largest RBOC in the United States, serving more than 60 million access lines, never adopted the interim compensation regime after it became effective. *See* SBC Communications, Inc., Annual Report 2001, at 16 (Feb. 28, 2002) ("To date, none of our wireline subsidiaries have opted into the transition plan."),

http://www.sbc.com/investor_relations/company_reports_and_sec_filings/0,5931,136,00.html. Even though SBC prevailed at the FCC, SBC elected to maintain the status quo ante rather than comply with the requirements of the new interim compensation regime. SBC's conduct with respect to the new interim compensation regime proves that the new compensation regime was not necessary.

The prevailing appellants, including the Competitive Local Telephone Companies, are entitled to greater relief than that provided by the D.C. Circuit: "If a party has standing and prevails under its APA claim, it is entitled to a remedy under the statute, which normally will be a vacatur of the agency's order." *Andrx Pharmaceuticals, Inc. v. Biovail Corporation*, 276 F.3d 1368, 1379 (Fed. Cir. 2002); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). The Court should grant certiorari in order to review the action of the D.C. Circuit and provide the prevailing appellants with an adequate remedy.

IV. Remand Without Vacatur Constitutes an Evasion of the Requirements of *Bowen v. Georgetown University Hospital*

The Court should also grant the writ of certiorari because the "remand without vacatur" practice has mushroomed since the Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468, 102 L.Ed.2d 493 (1988). In *Georgetown*, the Court ruled that a decision from a federal agency following a remand from a federal court cannot be applied retroactively, without clear consent from Congress. The *Georgetown* decision thus laid bare a potential problem for administrative agencies: if their decisions were remanded and vacated following judicial review, there could be a gap in federal regulation until the agency issued a replacement rule in response to the remand instructions. This Court was presented with this argument by the federal agency in *Georgetown*: the Secretary of Health and Human Services asked to be allowed to issue "retroactive curative rulemaking" to cure the defect of a rule that had been invalidated by a court on review. *Id.* at 475. The Court declined to consider the issue because the applicable statutory scheme resolved the matter.. *Id.*

The D.C. Circuit has recognized that a decision not to vacate an agency order is a direct consequence of, and an attempt to avoid the implications of, the *Georgetown* decision. In *Allied-Signal,* the D.C. Circuit identified the criteria it considers when deciding whether to vacate a decision remanded to a federal agency. One of the criteria identified in *Allied-Signal* is the disruptive consequence of an interim change in federal regulation that may itself be changed when the agency issues its subsequent decision. *Id.* at 150-151. The D.C. Circuit specifically identified the consequences that the *Georgetown* decision would have on the Nuclear Regulatory Commission as sufficiently disruptive to warrant remand without vacatur. *Id.* at 151.

In *ICORE, Inc. v. FCC*, 985 F.2d 1075 (D.C. Cir. 1993), the D.C. Circuit addressed the relationship between remand without vacatur and the *Georgetown* decision. In support of an earlier decision remanding a decision to the FCC without vacating it, the D.C. Circuit rejected the argument that such conduct was prohibited by *Georgetown*. The D.C. Circuit recognized a distinction between "the use of retroactive rulemaking to cure a gap created by judicial vacatur of a rule" and "the judicial decision not to create such a gap." *Id.* at 1082. As long as the D.C. Circuit did not vacate the FCC decision, the reasoning goes, there is no problem with retroactive rulemaking that violated *Georgetown*.

The *ICORE* and *Allied-Signal* decisions represent an overt effort to evade the implications of *Georgetown*. Whether such an approach is acceptable, or even lawful, has not been addressed by this Court. Absent a more direct statement from this Court, the D.C. Circuit does not have the authority to ignore the "shall set aside" language of the APA when an agency errs as a matter of law. The practical implications of the *Georgetown* decision cannot supersede the plain language of the APA.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit as requested by Core Communications, Inc. .

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